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Approaching Reform: The Future of Multijurisdictional Practice in Today's Legal Profession

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APPROACHING REFORM: THE FUTURE OF MULTIJURISDICTIONAL PRACTICE IN TODAY'S LEGAL PROFESSION

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APPROACHING REFORM: THE FUTURE OF MULTIJURISDICTIONAL PRACTICE IN TODAY’S LEGAL PROFESSION

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I. INTRODUCTION

Multijurisdictional practice is now a full-fledged reality. The legal profession has entered a time in which lawyers have access to a wealth of information through the rapid increase in technological development. For example, a Florida lawyer vacationing in Europe can

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pull out his Palm Pilot and conduct research for a case pending back home simply by plugging the device into his cellular phone. Another lawyer in New York can access the Internet and research just about any area of the law in any part of the world. With relative speed, he can learn how to write a will in Oregon or draft articles of incorporation in California. A lawyer can easily contact a friend or partner in another state via e-mail or telephone and obtain advice regarding the law in another state. A lawyer can now be on the other side of the country but make it to a local court in a matter of hours after preparing for her case on a laptop in the airplane.

While out-of-state lawyers arguably are not as “competent” as a lawyer licensed in a particular state, with enough time and research, the lawyer who practices wills and trusts law in New York can quickly become more competent in California wills and trusts law than the California-licensed lawyer who practices criminal law in California. Although the legal profession is changing as fast as technology, our laws are not keeping pace.¹ State laws of unauthorized practice primarily govern multijurisdictional practice. Yet these laws are not compatible with the reality in which we now live. When unauthorized practice of law (UPL) regulations were created at the turn of the century, legislators and state judges did not have the same concerns of today’s legal professionals.² Lawyers generally never practiced outside of their state.³ It was hard enough to visit family across the country, much less to get there and conduct sufficient research to become competent with substantially different legal rules. Nonetheless, states continue to apply these antiquated laws to attorneys practicing in an era of easy transit and mass communication. States ignore the fact that clients often need their attorneys to advocate their causes in states where their attorneys have no license.

A fundamental principle governing the practice of law today is the need to “keep up with the times.” Our society no longer has a problem with communication or travel. We have access to the most technologically advanced equipment in the world, as evidenced by the increased use of videoconferencing, the growing trend to work at home and communicate via computer, or even the ability to obtain a college degree from a reputable university without leaving home. Law firms are progressing with the rest of the economy. State laws regulating

1. See generally Bruce A. Green, *Assisting Clients With Multi-State and Interstate Legal Problems: The Need to Bring the Professional Regulation of Lawyers Into the 21st Century*, at http://www.abanet.org/cpr/mjp-bruce_green_report.html (March 2000).

2. Robert A. Creamer, *Private Practitioner Issues With Multijurisdictional Law Practice in Litigation Matters*, at <http://www.abanet.org/cpr/mjp-bcreamer.html> (March 2000).

3. Joseph R. Lundy, *Private Practitioner Problems With Multijurisdictional Law Practice in Transactional and Other Non-Litigation Matters* pt. 5, at <http://www.abanet.org/cpr/mjp-uplpaper.html> (March 2000) (“Most state UPL statutes and rules originated at a time when commerce and law practice were mostly local . . .”).

legal practice must change to accommodate the increasingly common multistate law firm.

This brings up a relatively new concept (that is, within the last thirty years or so) that has developed to the extent that many states are now recognizing the need for reform. Multijurisdictional practice occurs when a lawyer licensed in his or her home state crosses state boundaries to handle legal matters in a state where he or she is not licensed. America's economy is changing rapidly. Businesses, large and small, are becoming global in nature. With the rapid advancements in technology, businesses easily market their products or services in many countries while never leaving their home state. Lawyers are rapidly following suit. The legal profession must keep up with the trend in the global economy to enable lawyers to respond to their clients' needs in areas away from home. Under current UPL regulations, lawyers often face sanctions for ethical violations they were not even aware that they were committing.

Recognizing the need for reform, past-President of the American Bar Association (ABA) Martha Barnett appointed a Commission on Multijurisdictional Practice to examine the theories plaguing the legal profession in this context today. The Commission exists primarily to examine the burdens imposed upon the legal profession by current proscriptions of multijurisdictional practice and to issue a report and recommendation regarding reform of these rules.⁴ The Commission's proposed changes to the ABA's Model Rules of Professional Conduct are expected in late 2002. Ultimately, however, states must decide which course of action to take.⁵ Many states have already created committees to analyze the need for reform of these rules; proposals are expected to arise within the next couple of years.⁶

Because it is increasingly clear that much-needed changes to this aspect of lawyer regulation will occur, this Article provides informative material to guide states in their quest to reform their own UPL laws. Many factors must be considered separately, and all are equally important. Reforming such a well-established body of law will require attention to all areas of the law as it currently exists in light of the fact that it changes every day. While states have the ultimate authority to decide for themselves how the practice of law should be governed, they should realize that outdated laws can no longer govern the legal profession.

4. Commission on Multijurisdictional Practice, at <http://www.abanet.org/cpr/mjp-home.html> (last visited March 22, 2002).

5. A state's sole power to regulate the legal profession usually arises from its state constitution. Thus, absent constitutional amendment, any action of reform must be taken by the states.

6. For a list of states that have created such committees and for a discussion of their present actions, see <http://www.crossingthebar.com> (last edited March 19, 2002).

This Article discusses the need for reform and describes potential solutions. Part II discusses the primary problems with current UPL regulations in light of our changing economy. Part III then examines the areas of the legal profession that must be addressed to propose the most effective reform and suggests what information is necessary for states to make an informed decision. New rules will not succeed unless each interest is adequately considered and accounted for. Part III also discusses the constitutional rights of states, consumers, and lawyers that must be balanced in a reformed body of law. Next, Part IV discusses the most prominently suggested avenues of reform, ranging from a national perspective to state-based reform. One of these suggestions, or a combination of proposals, will likely best suit the individual states. Part V then proposes concepts regarding what the author believes most likely to succeed in meeting the modern and future needs of the legal profession. Finally, Part VI briefly discusses the next steps that should be taken to fulfill the needs of the legal profession in the context of all rules of professional conduct.

A lawyer seeking an interstate practice should no longer worry about potential criminal sanctions or the possibility of not collecting his fees simply by representing a frequent client in matters involving another state's laws. While lawyers should certainly not be free to practice whatever they want whenever they want, they should not be precluded from taking advantage of the increasingly global economy in which we now live. They should not be excluded from areas in which other countries (those of the European Union in particular) have successfully entered. We are one of, if not the most, technologically advanced nations in the world; the legal profession should be able to take full advantage of that technological prowess.

II. THE CURRENT STATE OF UPL AND THE NEED FOR REFORM

A. *Defining "The Practice of Law"*

Before determining which legal services are unauthorized, courts must define the practice of law.⁷ State courts have defined it in a variety of ways—all resulting in different conclusions depending upon the specific factual scenario. While it is easy to generally conclude, as most courts and legal commentators do, that the practice of law is "what lawyers do,"⁸ this definition is useless when the practices of the legal profession overlap with other professions.⁹

7. Robert D. Welden, *Defining "The Practice of Law"—Untying the Gordian Knot*, WASH. ST. B. NEWS, Jan. 2001, at 41, available at <http://www.wsba.org/barnews/2001/01/welden.htm>.

8. See, e.g., *State v. Chamberlain*, 232 P. 337, 338 (Wash. 1925).

9. This is particularly true with regard to the increasing phenomenon of the accounting profession providing legal services. While accountants are not violating any of their

Some courts define the practice of law simply, such as “the rendering of legal advice . . . and holding oneself out to be a lawyer.”¹⁰ Consequently, such advice or service must be rendered to a client.¹¹ Others define the practice of law to consist “in no small part of work performed outside of any court and having no immediate relation to proceedings in court.”¹² Such activities necessarily involve a high degree of legal skill and a great adaptation to complex situations.¹³ A more recent definition entails “sufficient contact with [a client] to render the nature of the legal service a clear legal representation.”¹⁴ Ultimately, however, the practice of law is established separately by each state on a case-by-case basis and varies from one jurisdiction to another.¹⁵

Broadly defining the practice of law often proves too tough a task for state courts to accomplish consistently. Courts have long recognized that “attempts to define the practice of law in terms of enumerating the specific types of services that come within the phrase are fruitless because new developments in society, whether legislative, social, or scientific in nature, continually create new concepts and new legal problems.”¹⁶ Thus, most states define the practice of law in terms of what it is not—in terms of what constitutes a violation for the unauthorized practice of law. Therein lies the problem. While courts recognize that the practice of law changes daily, states continue to operate under UPL definitions created at the turn of the century. Such definitions simply do not fulfill their purpose as the legal profession increasingly and unavoidably becomes multijurisdictional in nature.

Since the founding of our Republic, states have had the exclusive authority to license and regulate their lawyers.¹⁷ States have regu-

rules of professional conduct, an attorney performing the same type of services could be violating the rules of professional conduct in a state in which he is not licensed. *See also* Anthony E. Davis, *Multijurisdictional Practice by Transactional Lawyers—Why the Sky Really Is Falling*, at <http://www.abanet.org/cpr/mjp-adavis.html> (March 2000) (recognizing that accounting firms may be only a step away from providing legal services, which is significant because they are free to practice without restriction across state lines).

10. *El Gemayel v. Seaman*, 533 N.E.2d 245, 248 (N.Y. 1988). *But cf.* *Fought & Co., Inc. v. Steel Eng'g & Erection, Inc.*, 951 P.2d 487, 495-98 (Haw. 1998) (providing legal services as consultant is not practicing law within a foreign jurisdiction); *Shapiro v. Steinberg*, 440 N.W.2d 9, 11 (Mich. Ct. App. 1989) (stating that not everything an attorney does to help with a case constitutes the practice of law).

11. *El Gemayel*, 533 N.E.2d at 248.

12. *Ranta v. McCarney*, 391 N.W.2d 161, 163 (N.D. 1986) (quoting *Cain v. Merchs. Nat'l Bank & Trust Co.*, 268 N.W. 719, 722 (N.D. 1936)).

13. *Id.*

14. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 5 (Cal. 1998).

15. MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. (2001).

16. *Fought & Co. v. Steel Eng'g & Erection, Inc.*, 951 P.2d 487, 495 (Haw. 1998) (citing S. REP. NO. 700, at 661 (1955); H.R. REP. NO. 612, at 783 (1955)).

17. *Leis v. Flynt*, 439 U.S. 438, 442 (1979).

lated their lawyers by prescribing the qualifications for admission to practice law within the state and by creating disciplinary rules to govern legal practice once the lawyer is admitted.¹⁸ State disciplinary rules, also known as rules of professional conduct, regulate every aspect of the legal profession. The focus of this Article, rules regulating UPL, is only one aspect of this body of regulations. Generally, the basic premise of UPL regulations is that only lawyers licensed in the state (having passed that state's bar examination) are authorized to practice law within the state.¹⁹ A lawyer who is licensed in another state and competent to practice law is subject to sanctions if he practices law within a state in which he is not licensed. As will be discussed, most of these rules have exceptions, such as a *pro hac vice* rule for litigators or reciprocity arrangements between states where a lawyer need simply apply to practice within the state. However, as the law becomes increasingly global, UPL laws are becoming unclear and the conflict among jurisdictions great.

B. Concerns With Current UPL Regulations

1. Current UPL Regulations Are Outdated and Sporadically Enforced

Although originally enacted to protect lawyers' private interests,²⁰ the primary reason currently given by courts and lawmakers for the regulation of UPL is to protect consumers.²¹ States assume, and perhaps at one time rightly so, that lawyers who have not fulfilled a state's admissions requirements are not competent to practice law within that state. As a result, clients will be harmed and malpractice will ensue.²² However, the legal profession as it exists today does not pose the same sort of problems it once did. Most UPL laws were passed between the 1870s and the 1920s.²³ At that time, the stringent requirements were easily justified because most client matters did not extend beyond the licensing state's boundaries, and lawyers could not easily learn the law of another jurisdiction. One would not

18. *Id.*

19. For a survey of state laws regulating multijurisdictional practice, see Attorneys' Liability Assurance Society, Inc., *Statutes and Rules Limiting Multijurisdictional Law Practice From 51 United States Jurisdictions*, at <http://www.abanet.org/cpr/mjp-uplrules.html> (March 2000).

20. Welden, *supra* note 7.

21. See, e.g., *Chandris, S.A. v. Yanakakis*, 668 So. 2d 180, 184 (Fla. 1995) (citing *Fla. Bar v. Brumbaugh*, 355 So. 2d 1186, 1192 (Fla. 1978)); *Ranta v. McCarney*, 391 N.W.2d 161, 163 (N.D. 1986).

22. See generally John S. Dzienkowski, *Legal Malpractice and the Multistate Law Firm: Supervision of Multistate Offices; Firms as Limited Liability Partnerships; and Pre-dispute Agreements to Arbitrate Client Malpractice Claims*, 36 S. TEX. L. REV. 967 (1995).

23. Welden, *supra* note 7. The Model Code and Model Rules were passed later but essentially kept the same definition.

question a licensed lawyer's competence over that of an unlicensed lawyer. This is no longer the case; however, although client needs and legal practices have changed, the law has not adapted with them.²⁴

Most states broadly define UPL as "[p]ractic[ing] law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction."²⁵ The rest is left to judicial determination.²⁶ The problem now plaguing the legal profession is states' inconsistent interpretation of this general definition. Every court has its own criteria or test to determine whether the practice of law by an out-of-state lawyer is unauthorized, and these tests are rarely in accordance with one another.

Additionally, states enforce these regulations sporadically and courts rarely construe them.²⁷ As a result, lawyers have no idea whether they are violating the law. They are not aware that their everyday conduct could potentially subject them to sanctions as harsh as criminal penalties. For the sake of consumers and lawyers and the smooth operation of the legal profession in modern society, a clearer standard must be applied.

2. *Defining the Required Level of "Competence"*

With the ultimate goal of protecting clients, states are primarily concerned with lawyers' "competency." ABA Model Rule 1.1 requires that all lawyers provide competent representation to their clients.²⁸ Competence is defined as requiring the "legal knowledge, skill, thoroughness and preparation *reasonably necessary* for the representation."²⁹ Again, what is "reasonable" or "necessary" is not consistently construed. The Comment to the Rule provides various factors to consider in determining competence, yet none of these factors are contingent upon a lawyer's license within a particular state.³⁰ Additionally, the current definition continues to assume that an unlicensed lawyer is incompetent to practice law in that state without a chance to prove otherwise. The definition of competence ultimately depends

24. Green, *supra* note 1.

25. UPL, at <http://www.crossingthebar.com/upl.htm> (last edited Dec. 27, 2001); see also Attorneys' Liability Assurance Society, Inc., *supra* note 19.

26. MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. (2001).

27. Green, *supra* note 1.

28. MODEL RULES OF PROF'L CONDUCT R. 1.1.

29. *Id.* (emphasis added).

30. *Id.* R. 1.1 cmt. Such factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the particular field. *Id.*

upon the particular factual scenario and the court faced with the scenario.

This is not to say that competence is not an important, if not the most important, factor in determining whether an unlicensed lawyer should be permitted to practice within a state. Rather, when considering the level of competence required of an out-of-state lawyer, the standard must be determined on a case-by-case basis, taking into consideration the attorney's background in the area of law in question.³¹ The general definition of competence in this context should not preclude an unlicensed lawyer from practicing within the state as long as the lawyer proves adequate knowledge of local law and that his practice requires entrance into that state. Competence requires a necessary level of skill and experience in a particular area. The legislature or the state bar should define it in a way that courts can adequately and consistently fulfill the criterion's purpose, recognizing the capability and increasing necessity of out-of-state lawyers to quickly become competent in local law. Otherwise the primary justification for UPL laws is rendered unenforceable and useless. The law as it currently stands is overbroad.

3. *Current Law Does Not Differentiate Between Lawyers and Nonlawyers*

States' prohibitions of nonlicensed lawyers from practicing in their jurisdiction make no distinction between lawyers who are competent and licensed in another jurisdiction and those who have never attended law school.³² Such a stringent prohibition is not feasible in today's multijurisdictional legal environment. For example, such a broad definition cannot apply equally to someone who has practiced law in another state for twenty years and a layperson who has never attended law school but is misleadingly holding himself out as a lawyer. The lawyer licensed in another state may be an expert in her particular area of law yet precluded from assisting her client in a matter in another state. If the lawyer is not required to appear in court, there is no formal mechanism for that lawyer to be admitted, even temporarily, to that state. Again, this restriction is unnecessarily overbroad.

4. *Current Law Restricts Free Trade*

Current UPL laws also do not take clients' needs into consideration. In reality, we do not live or do business in isolation within strict

31. *E.g.*, *In re Estate of Waring*, 221 A.2d 193, 198 (N.J. 1966) (stating that "questions of unlawful practice will turn on the particular facts presented").

32. Creamer, *supra* note 2.

geopolitical boundaries.³³ Even personal matters now transcend state or national lines. Thus, the current state of the law creates a tension between the right of a client to choose his counsel and the right of a state to control the activities of lawyers practicing within its boundaries.³⁴ Courts are quick to recognize such problems, yet states are reluctant to respond with a solution. In the interest of protecting the public, one court has stated that the “legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including [appearance before a tribunal].”³⁵ Nonetheless, the problems cannot be cured until current rules are amended.

Some organizations argue that by restricting a client’s right to choose counsel, current UPL regulations violate the Commerce Clause of the U.S. Constitution.³⁶ The Commerce Clause prohibits states from placing burdens on interstate commerce, thereby restricting free trade.³⁷ By burdening a client’s right to seek assistance of counsel outside of his or her home state even in nonlitigation contexts, “the[se] rule[s] impair[] the provision of the most effective, efficient, and economical legal services by attorneys involved in the interstate practice of law to clients engaged in interstate commerce.”³⁸ The rules arguably violate two primary standards of the Commerce Clause: they discriminate against interstate commerce by favoring local counsel against interstate competitors, and they burden interstate commerce by making it more expensive and difficult for interstate clients to obtain desired counsel.³⁹

Our economy functions under the concept of free trade. Laws exist to promote competition and to prevent monopolies among businesses in the interest of consumers.⁴⁰ By preventing one company from monopolizing the entire market in one region, that company is forced to compete with surrounding companies, thus resulting in lower prices and better service. The same can be said of the legal profession.⁴¹

33. *In re Estate of Condon*, 76 Cal. Rptr. 2d 922, 926-27 (Cal. Ct. App. 1998).

34. *Id.*

35. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 6 (Cal. 1998) (quoting MODEL CODE OF PROF’L RESPONSIBILITY EC 3-9).

36. It is important to note that while this argument is relevant for this discussion, the U.S. Supreme Court has not ruled on this issue.

37. *Assoc. Indus. v. Lohman*, 511 U.S. 641, 646 (1994).

38. Brief for Amici Curiae Am. Corp. Counsel Ass’n, *Birbrower, Montalbano, Condon & Frank v. ESQ Business Serv.*, 525 U.S. 920 (1998) (No. 97-1798), available at <http://www.abanet.org/cpr/mjp-birbrower.html>.

39. *Id.*

40. See, e.g., Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1994).

41. See, e.g., *Goldfarb v. Va. State Bar*, 421 U.S. 773, 788 (1975) (stating that the practice of law has a “business aspect”).

While the state has a legitimate interest in protecting its citizens from incompetent lawyers, preventing all interstate practice is overbroad. Consumers seeking legal services should be permitted to choose their counsel as they wish, subject to reasonable state regulations. Additionally, the increasing need of lawyers to provide effective assistance of counsel to their existing interstate clients requires that states eliminate the unnecessary barriers to interstate practice.⁴²

5. *Current Laws Are Uncertain, Unclear, and Differ Substantially*

Although most state rules are somewhat similar in requiring a license to practice law, most states differ substantially as to what constitutes UPL.⁴³ As a result, most lawyers are not aware that they could be violating the law.⁴⁴ For example, states conflict as to whether the practice of law is unauthorized when a lawyer not licensed within the state is practicing purely federal law.⁴⁵ While states have exclusive authority over the activities of lawyers within their borders involving state law, federal law governs who may practice in federal courts.⁴⁶ However, this general rule is blurred depending upon which type of federal law is at issue.⁴⁷ Furthermore, even the states that do recognize an exception to state rules governing attorneys who practice only federal issues differ as to associated issues, such as whether attorneys can actu-

42. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 cmt. b (1998).

43. Green, *supra* note 1.

44. E.g., Tamara Loomis, *Unauthorized Practice: Many Lawyers Do Not Know They Are in Violation*, N.Y. L.J., Mar. 29, 2001.

45. *In re Peterson*, 163 B.R. 665, 674 (Bankr. D. Conn. 1994) (finding federal exception not sharply defined). The U.S. Supreme Court addressed this issue in *Sperry v. Florida*, 373 U.S. 379, 384 (1963), stating that when Congress has explicitly permitted federal regulation, it preempts state law. However, courts do not consistently construe this case, resulting in substantial conflict. Compare *In re Poole*, 222 F.3d 618, 620, 622 (9th Cir. 2000) (stating in dicta that “[a]dmission to practice law before a state’s courts and admission to practice before the federal courts in that state are separate, independent privileges” and that “practice before federal courts is not governed by state court rules”), with *Rittenhouse v. Delta Home Improvement, Inc.*, 255 B.R. 294 (W.D. Mich. 2000) (stating that both state and federal law may apply to attorneys practicing in a federal court).

46. *But cf. Rittenhouse*, 255 B.R. 294 (stating that relevant state and federal rules govern different spheres of conduct and generally complement each other, and noting that state law must yield only when incompatible with federal law). This sentiment, however, has been challenged and ultimately appears to depend upon which area of federal law is at issue and whether Congress has explicitly given federal courts the power to make regulations. If so, federal law preempts. If not, it does not. See generally *Sperry*, 373 U.S. 379. Nonetheless, courts do not consistently apply these principles.

47. For example, what is basically a federal claim may have incidental issues that involve state law. Consider patent law versus bankruptcy law. Patent law involves exclusively federal law and is controlled exclusively by federal regulations. See *Sperry*, 373 U.S. at 384-86. However, bankruptcy law can coincide with state law in some circumstances, although a practicing attorney could view these state matters as merely incidental to her federal practice and decide that they do not apply.

ally maintain offices in the state when only admitted to practice in the district.⁴⁸ Most lawyers are not aware of these fine distinctions when practicing federal law. They do not hesitate to enter another state to practice because they are not concerned with state law. Nonetheless, unbeknownst to these lawyers, they could be subject to criminal penalties for violating local UPL rules for reasons that vary among jurisdictions.

Additionally, UPL laws diverge with regard to the frequency of contact a lawyer has with the state. Some lawyers enter states only on rare occasions when an existing client matter requires it. Other lawyers who have clients with more global matters, however, are frequently required to enter another jurisdiction. While most courts agree that frequent practice within state boundaries requires something more than a simple request for admittance,⁴⁹ the frequency of practice required is unclear and depends upon very particular circumstances.⁵⁰ Lawyers need to know when they are to comply with local law. Moreover, if the states are in fact concerned with protecting consumers, current UPL regulations are unrealistic. A lawyer who frequently enters the state is undoubtedly more competent regarding that state's laws than the lawyer who only rarely enters. Yet existing exceptions to UPL regulations permitting a lawyer to be temporarily admitted in the state make it easier for the infrequent visitor to be temporarily admitted than

48. For example, courts have held that an out-of-state lawyer is not precluded from practicing federal law within a foreign state subject to federal court rules and not subject to state rules. *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 166 (2d Cir. 1966); *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 6-7 (Cal. 1998). However, while this is the general law, it has been held not to apply to lawyers who maintain an office in the foreign state to practice purely federal issues. Some courts have noted in these situations that the federal exception rule does not apply because the lawyer may be inclined to advise clients only on federal issues when more feasible state law alternatives may be the appropriate choice of action. Additionally, clients seeking assistance from these lawyers are unaware that their lawyer may only assist with federal issues. See *In re Lite Ray Realty Corp.*, 257 B.R. 150 (S.D.N.Y. 2001); *Att'y Grievance Comm'n of Md. v. Harris-Smith*, 737 A.2d 567 (Md. Ct. App. 1999); cf. *In re Peterson*, 163 B.R. 665 (stating that attorney may maintain an office and practice law within a state in which the attorney is not licensed as long as matters are limited to federal matters pending in federal court, but also noting the important difference between maintaining an office to litigate federal matters and maintaining an office to practice law generally). Lawyers may not realize that courts have distinguished general federal practice and litigating federal issues in the district court. The law differs with regard to whether the lawyer maintains an office to attract new clients or to assist existing clients with issues that arise in that district.

49. See, e.g., *In re Jackman*, 761 A.2d 1103 (N.J. 2000).

50. Compare *Birbrower*, 949 P.2d 1 (finding that representation of one matter constituted UPL), and *Spivak v. Sachs*, 211 N.E.2d 329 (N.Y. 1965) (finding lawyer violated UPL laws even though conduct consisted of an isolated event), with *In re Estate of Waring*, 221 A.2d 193 (N.J. 1966) (holding that isolated representation did not constitute UPL), and *El Gemayel v. Seaman*, 533 N.E.2d 245 (N.Y. 1988) (finding contacts insufficient to constitute UPL).

the lawyer who has become thoroughly competent in that state's law.⁵¹

Other areas of concern exist with regard to whether a lawyer can maintain an office in the state,⁵² the activity of a lawyer who resides in the state but is not licensed there,⁵³ and the practices of a large multistate firm.⁵⁴ Opinions construing these issues turn on the particular facts of the case and usually involve the uncertain quandary of whether the attorney was "practicing law." Consequently, such issues should be considered so that attorneys will be aware of specific activity that is considered unauthorized. Current UPL regulations do not touch the surface of these problems.

Most lawyers accused of UPL are not doing so intentionally—they simply do not believe that what they are doing is unauthorized. Examples are prevalent in large multistate firms. Many large firms in the United States have offices in several states. The lawyers in these firms are licensed in the state of the office in which they work but not in every state in which the firm has an office. Thus if an associate travels to another office to assist with a case, the associate is most likely violating that state's UPL regulations.⁵⁵ On the contrary, however, if that associate were researching the same matter from his or her home office and never actually entered the state, the associate's behavior would not be unauthorized.⁵⁶ Such a fine distinction is illogical. On the one hand, an attorney's conduct is not unauthorized for giving advice to a client on a foreign issue as long as the attorney does not leave his home state. Yet, on the other hand, the attorney violates local rules by

51. See, e.g., CAL. CT. R. 983(a) (stating that repeated appearances can be cause for denial of application); FLA. R. JUDICIAL ADMIN. 2.061(a) (stating that denial may be justified after more than three appearances within one year); D.C. CT. OF APP. R. 49(c)(7)(i) (stating that an attorney cannot apply more than five times per calendar year absent exceptional circumstances). While denial for repeated appearances may be justified under current rules because those who repeatedly appear are likely to be attempting to forego current requirements, this is nonetheless an area that needs to be addressed for reform.

52. Compare *Perlah v. S.E.I. Corp.*, 612 A.2d 806 (Conn. App. Ct. 1992), and *Ranta v. McCarney*, 391 N.W.2d 161 (N.D. 1986), with *Sobol v. Perez*, 289 F. Supp. 392 (E.D. La. 1968) (applying state law), and *Fla. Bar v. Savitt*, 363 So. 2d 559 (Fla. 1978).

53. Compare *Chandris, S.A. v. Yanakakis*, 668 So. 2d 180 (Fla. 1995), with *Petition of Waters*, 447 P.2d 661 (Nev. 1968).

54. Compare *Fla. Bar v. Kaiser*, 397 So. 2d 1132 (Fla. 1981), with *N.Y. Criminal & Civil Courts Bar Ass'n v. Jacoby*, 460 N.E.2d 1325 (N.Y. 1984).

55. This fine distinction often depends upon whether the lawyer is considered to be "in" the state. Compare *Birbrower*, 949 P.2d 1, with *Fought & Co., Inc. v. Steel Eng'g & Erection, Inc.*, 951 P.2d 487 (Haw. 1998).

56. E.g., *Birbrower*, 949 P.2d at 2, 5-6 (rejecting the notion that state UPL regulations apply to services that an out-of-state law firm renders from its home state). But see *In re Estate of Condon*, 76 Cal. Rptr. 2d 922, 928 (Cal. Ct. App. 1998) (recognizing that if the goal is to protect the consumer, it should make no difference from where the out-of-state lawyer is practicing state law, since the level of incompetence of the lawyer is precisely the same).

entering the other state to meet with his client directly to give the same advice. Multijurisdictional lawyers cannot operate blindly, hoping that a particular court will construe the facts in their favor.

6. *Severity of Sanctions*

States authorize a variety of sanctions for violation of their UPL regulations.⁵⁷ Such penalties include the denial of fees, fines up to \$10,000,⁵⁸ conviction of a misdemeanor, up to two years in jail, or all of the above.⁵⁹ Because of the concerns discussed above, although the penalty for violation may be similar among states, the point at which the penalty will be imposed is not. As lawyers are not aware that their conduct is unauthorized, they are also not aware that their conduct could be considered criminal.

The most common form of sanction for UPL is the denial of fees. While this may not seem too harsh a penalty, imagine the lawyer who expended substantial time and resources defending a client only to discover that the work will not be compensated. That attorney likely had no idea that he was violating any rule. For an even more frightening scenario, imagine in-house counsel entering a state to advise its corporate client—unknowingly and unintentionally violating the law—and receiving one to two years of jail time.

Current sanctions may be legitimate considering the consequences that could result when an incompetent lawyer handles a case, particularly a person with no legal experience who is defrauding courts and consumers. However, these consequences are not prevalent in every situation. Indeed, such harsh sanctions are rarely justified in situations involving actual lawyers. Sanctions should be imposed only where necessary to fulfill the state's ultimate purpose of protecting its citizens. By reforming UPL laws, sanctions will only be imposed in situations necessitating such penalties, and lawyers will be aware when their conduct violates such laws.

III. FACTORS TO CONSIDER IN PROPOSING A CHANGE

A. *The Need to Address All Categories of Lawyers*

Before accepting proposals for reform, states must consider important distinctions among practice areas. For example, while pro hac vice rules may suffice with regard to litigators wishing to appear before the tribunal, the rule does not address litigators' need, for exam-

57. *E.g.*, UPL Sanctions, at <http://www.crossingthebar.com/upl-quickreference.htm> (last edited Dec. 27, 2001).

58. *Id.* (Pennsylvania).

59. *Id.* (Louisiana).

ple, to conduct a deposition within the state. On the same note, the needs of litigators are substantially different than the needs of transactional lawyers or in-house counsel. According to current rules, a transactional lawyer cannot even visit a client's office within a state to meet with and advise the client without violating UPL regulations. Each separate category within the legal profession must be addressed to implement a comprehensive, workable rule. Rules should be specific enough to account for each type of lawyer's needs to effectively conduct his or her practice across state lines. The following are the major categories of concern regarding UPL regulations. Each will be considered separately.

1. Litigators

Litigators are currently the only group of lawyers that have an explicit exception to practice law within another state's jurisdiction. Pro hac vice rules permit a lawyer simply to apply for admittance to practice in that jurisdiction for a particular case.⁶⁰ These rules, however, are not comprehensive. Pro hac vice rules apply only to admit lawyers to appear in court.⁶¹ They do not apply when a lawyer needs to participate in prelitigation activities such as taking a deposition or conducting discovery in another state.⁶² Often, the lawyer need only conduct a deposition and does not need to actually appear before a judge. In these cases, the lawyer is not protected from current UPL regulations.

Additionally, pro hac vice regulations are far from uniform among jurisdictions. States impose many different types of restrictions or character inquiries before admitting a lawyer to practice in just one case.⁶³ There are varying limits on the number of cases in which a lawyer may participate, and states differ as to whether a formal pro hac vice mechanism applies to hearings in front of administrative bodies. Thus, lawyers are unaware of the point at which they should apply for pro hac vice admission—at the outset of the litigation or when the lawyer discovers that she must appear before a court.

While current pro hac vice rules may suffice for admittance to appear in front of a tribunal, the other needs of litigators need to be addressed. Some recommend that pro hac vice rules be relaxed to permit counsel to handle prelitigation matters under pro hac vice ad-

60. Peter R. Jarvis, *Where You Stand Depends on Where You Sit: One Litigator's View of Multijurisdictional Practice Issues and Related Policy Questions*, at <http://www.abanet.org/cpr/mjp-pjarvis.html> (last visited March 22, 2002).

61. Green, *supra* note 1.

62. *Id.*

63. Jarvis, *supra* note 60.

mission.⁶⁴ However, situations frequently arise in which application for pro hac vice admission may be unnecessary and cumbersome, as when the lawyer needs only limited contact with the state.⁶⁵ This, too, should be considered.

2. Transactional Lawyers

This category includes regular transactional lawyers and other nonlitigators. There are no rules exempting lawyers from UPL sanctions when the lawyer does not need to appear in front of a tribunal. Thus the lawyer is precluded from advising a client from another state,⁶⁶ negotiating a contract for a foreign client,⁶⁷ assisting in real estate or other personal matters,⁶⁸ or otherwise fully participating in a client's legal matters within another jurisdiction.

3. Corporate Counsel

The problems facing in-house counsel are probably the most acute. Corporations expand or relocate frequently. Consequently, corporate counsel is often required to move with them into different jurisdictions.⁶⁹ If not required to actually move, counsel is often required to handle the many global matters facing a modern-day corporation.

Only eleven U.S. jurisdictions have corporate counsel rules separate from their UPL regulations that create a special exception permitting corporate counsel to practice law within their state.⁷⁰ Eight jurisdictions permit in-house counsel to practice within their state as an exception to their UPL regulations.⁷¹ The remaining jurisdictions do not differentiate corporate counsel from other forms of UPL, including that of laypersons.⁷² This is important because the scope of an in-house counsel's employment is practically indefinable. An in-

64. ABA Section of Litigation: Preliminary Position Statement on Multi-Jurisdictional Practice, at http://www.abanet.org/cpr/mjp-comm_sl.html (June 2001) [hereinafter ABA Section of Litigation].

65. *Id.*

66. *E.g.*, *Spivak v. Sachs*, 211 N.E.2d 329 (N.Y. 1965); *see also* Davis, *supra* note 9.

67. *E.g.*, *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998); *see also* Davis, *supra* note 9.

68. *E.g.*, *In re Estate of Condon*, 76 Cal. Rptr. 2d 922, 927 (Cal. Ct. App. 1998); *In re Estate of Waring*, 221 A.2d 193 (N.J. 1966); *see also* Lundy, *supra* note 3.

69. Am. Corp. Counsel Ass'n, *Multijurisdictional Practice Issues*, at <http://www.abanet.org/cpr/mjp-fordham.html> (last visited Feb. 2, 2002).

70. Corporate Counsel, at http://www.crossingthebar.com/corporate_counsel.htm (last edited Dec. 27, 2001). The twelve jurisdictions are Florida, Idaho, Kansas, Kentucky, Michigan, Minnesota, Missouri, Ohio, Oklahoma, Oregon, South Carolina, and Washington. *Id.*; *see also* ABA Center for Professional Responsibility, Corporate Admissions Standards, at <http://www.abanet.org/cpr/mjp-uplchart.html> (last visited Feb. 2, 2002).

71. Corporate Counsel, *supra* note 70. The eight jurisdictions are Alabama, Connecticut, Maryland, New Jersey, North Carolina, Texas, Virginia, and the District of Columbia. *Id.*

72. *Id.*

house counsel's day-to-day duties involve, but are not limited to, advising clients on litigation matters, transactional matters, matters relating to their national and international business practices, areas of federal and state regulation, the supervision of outside counsel, and the internal management of day-to-day client legal work.⁷³ Other in-house attorneys are specialists. Some of their practice fields involve purely federal issues that (should) have nothing to do with licensure in a particular state. Thus in-house counsel are more likely to practice law in other jurisdictions and least likely to know in advance which UPL regulations will apply to them.

Additionally, the desire to protect clients in this context is not completely justified. Corporations are sophisticated consumers. They have the resources and expertise with which to investigate a lawyer's background and the competence to make an intelligent decision regarding legal counsel. They realize that corporate counsel often will not be licensed in more than one state. If legal matters transcend state boundaries and involve state law, the corporation will realize that the attorney will have to expend extra time to become competent in the law of that state. Thus corporations as consumers do not need the same kinds of protection as an average client.

4. *Alternative Dispute Resolution*

The primary conflict among states regarding UPL and alternative dispute resolution (ADR) is whether ADR actually constitutes the practice of law.⁷⁴ ADR is an alternative method to resolve disputes, often without litigation. It is arguably not a manner in which to practice law. Yet some courts have held that ADR constitutes the practice of law for UPL purposes.⁷⁵

Arbitrators and mediators are not required to be lawyers. Similarly, lawyers who serve as arbitrators or mediators should not be considered to be practicing law—they are neutral third parties whose role is to assist disputants in reaching a resolution.⁷⁶ The line is less clear regarding the advocates who participate with their clients in a form of ADR. For example, some advocates choose a different venue for purposes of neutrality.⁷⁷ States should determine whether ADR

73. Am. Corp. Counsel Ass'n, *supra* note 69.

74. See, e.g., Diane Leigh Babb, *Take Caution When Representing Clients Across State Lines: The Services Provided May Constitute the Unauthorized Practice of Law*, 50 ALA. L. REV. 535, 546-47 (1999).

75. See, e.g., *In re Creasy*, 12 P.3d 214 (Ariz. 2000); *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 8-9 (Cal. 1998); see also *Office of Disciplinary Counsel v. Brown*, 584 N.E.2d 1391 (Ohio Bd. of Comm'rs on UPL 1992).

76. Letter from American Arbitration Association to ABA Commission on Multijurisdictional Practice, at http://abanet.org/cpr/mjp-comm_aaa.html (June 15, 2001).

77. *Id.*

should be considered UPL and, if so, whether they should provide an exception to the UPL regulations. In making this determination, states should note the positive effects ADR has had on the legal profession and its success in promoting peaceful settlement of claims, thereby allowing courts to focus on more pressing matters. ADR should be promoted throughout the legal community as a successful alternative for handling disputes. Current UPL regulations prohibit such activity.

California provides a recent example of a state taking action in this context. In *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*,⁷⁸ the California Supreme Court held that ADR fell within California's UPL laws and refused to create an arbitration exception. In response, the California Legislature enacted a new statute allowing out-of-state lawyers to conduct arbitrations within the state for a fee to be collected by the state bar.⁷⁹ This statute, as initially enacted, was temporary and was to be automatically repealed on January 1, 2001.⁸⁰ However, in the 2000 legislative session, the California Legislature extended the statute's operative term until 2006.⁸¹

B. Constitutional Interests Must Be Balanced

1. States' Interests

States have always had the exclusive authority to regulate the activity of their lawyers.⁸² Consequently, there is no right of federal origin permitting an attorney to practice law in a state without meeting that state's admissions requirements.⁸³ States exercise their authority with the primary concern of protecting their citizens.⁸⁴ Thus, states preclude persons from representing their citizens without proper training. With regard to out-of-state lawyers, states view the proper training as successful completion of their bar exam.

While protecting citizens' rights is certainly a legitimate interest, some commentators argue that state regulation does not protect the public. One commentator argues that state regulation actually defies common sense, particularly in the age of the Internet.⁸⁵ He argues that there is no public interest in protecting citizens from actual law-

78. 949 P.2d 1 (Cal. 1998).

79. CAL. CIV. PROC. CODE § 1282.4 (1999); *see also* Creamer, *supra* note 2.

80. Creamer, *supra* note 2.

81. Stats. 2000, c. 1011, § 2, in subd. (j).

82. *Leis v. Flynt*, 439 U.S. 438, 442 (1979).

83. *Id.* at 443.

84. Green, *supra* note 1.

85. Davis, *supra* note 9.

yers—that such prohibitions actually demean the purpose of the regulation.⁸⁶ The states' motives arguably are purely monopolistic.⁸⁷

2. *Clients' (Consumers') Interests*

Perhaps the most common argument against current UPL regulation with regard to clients' interests is that it infringes upon a consumer's constitutional right to choose counsel. This situation arises most often where a client has used the same lawyer before and is comfortable with that person.

While some states permit out-of-state lawyers to practice within a foreign jurisdiction, this flexibility is often contingent upon the retention of local counsel.⁸⁸ Some argue that this is an extremely costly, time-consuming, and disruptive requirement.⁸⁹ Most clients choose lawyers who they trust. Not only are these lawyers familiar with the intricacies of the client's matter, but they are also likely to fulfill the requirement of local counsel merely to serve as a "front man." Lawyers, particularly those with more experience, are arguably less likely to actually refer to the local counsel for anything other than what time to appear in court.⁹⁰ Thus the client's interests are not further protected; instead, his or her money is wasted.

3. *Lawyers' Interests*

There are generally two schools of thought in evaluating lawyers' interest in UPL. On one side are lawyers who resist reform arguably to prevent further competition and protect local practice.⁹¹ At the other are lawyers whose matters require that they be able to enter a jurisdiction more freely without a license.

When it comes to restricting the practices of the legal profession, lawyers' motives are often viewed with suspicion.⁹² Lawyers who assist in implementing current UPL regulations are accused of "protecting their turf" from competition from larger, out-of-state firms. Consumer protection must actually be a sincere motivation—evidenced by laws that truly fulfill this purpose and do not merely prohibit others from participating.⁹³ Those who doubt the validity of "consumer protection" accuse such lawyers of protecting their fran-

86. *Id.*

87. *Id.*

88. Creamer, *supra* note 2.

89. *E.g.*, Lundy, *supra* note 3.

90. Babb, *supra* note 74, at 550.

91. *Id.*

92. Welden, *supra* note 7.

93. *Id.*

chise, “whatever the cost, burden, inconvenience, and disruption to clients who may be denied their choice of counsel.”⁹⁴

Lawyers promoting reform have an interest in growing at the same pace as their clients. Law firms are not just service providers; they are also businesses. There is no need for the economy to progress and the legal profession to stand still. Firms must be able to protect their clients’ interests to their fullest capacity. They also need assurance that they will not have to refer their clients to various lawyers in various states when a foreign issue arises.

IV. SUGGESTED AVENUES OF REFORM

A. *National Reform*

Proponents of national reform suggest that all current problems with UPL regulations be remedied by a national, uniform standard.⁹⁵ The first step to implement such reform is to create a national bar responsible for developing a uniform definition of what it means to practice law within a jurisdiction and what is clearly unauthorized.⁹⁶ This definition must be fluid enough to encompass potential changes in the legal profession. The next step will be to provide “safe harbors” outlining exceptions to the general rule of unauthorized practices. Such exceptions should take into account the varying needs of lawyers and the frequency with which they enter other jurisdictions. Finally, the rule should take into account the ability of a lawyer to practice law “in” a state without ever actually entering the state—that is, via communications technology.⁹⁷ The national bar, rather than the individual states, would also be responsible for disciplining lawyers in violation of the rule. It could determine whether federal or state courts would enforce national standards.

Such an example to consider is the success of the European Union (EU) Model. This model permits lawyers from any of the EU’s fifteen member states⁹⁸ to cross jurisdictional boundaries and practice within another EU country. The attorney practices in the other country under his home-state title (e.g., solicitor) and may do so on a

94. Creamer, *supra* note 2.

95. For a thorough analysis of arguments for and against national reform, see Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994).

96. Green, *supra* note 1.

97. *Id.*

98. The EU member states consist of Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. Roger J. Goebel, *The Liberalization of Interstate Legal Practice in the European Union: Lessons for the United States?*, 34 INT’L LAW. 307, 307 n.1 (2000).

permanent basis.⁹⁹ The attorney is required only to register in the member country.¹⁰⁰ Upon completion, the attorney may advise clients with regard to home and host state law, international law, and EU law.¹⁰¹ Registered attorneys are subject to the disciplinary rules of both the home and host countries.¹⁰²

The EU adopted this directive after recognizing the dramatic increase in cross-border activity similar to that of the U.S.¹⁰³ The EU model has effectively permitted attorneys to fully assist their clients even though the attorney is not a resident of the country he or she is visiting.¹⁰⁴ While the laws of the member countries may vary considerably from jurisdiction to jurisdiction, the EU has recognized the need for uniformity in a multijurisdictional setting, and the benefits have proven to outweigh the costs of not being grounded in a particular jurisdiction.¹⁰⁵ EU lawyers may now practice in almost all fields of law in the EU community, represent clients on a continuous basis, and form multinational law firms with offices in any desired member state.¹⁰⁶

Enforcing a national standard would also change the way lawyers are admitted to practice law. Some commentators have suggested a national registration process requiring the creation of a national bar association to regulate interjurisdictional practice.¹⁰⁷ A national registry would enable every lawyer admitted in any state to be registered nationally automatically.¹⁰⁸ Under this system, states would then develop their own system of separate registration.¹⁰⁹ Another suggested alternative includes a national bar examination, successful passage of which would permit the attorney to "practice in federal courts, engage in services not before a tribunal, and practice in the courts of any state on a limited basis until proving knowledge of local law."¹¹⁰ Finally, another commentator suggests a model uniform UPL

99. Council Directive 98/5, 1998 O.J. (L 77/36); see also William L. Reynolds & William M. Richman, *Multi-Jurisdiction Practice and the Conflict of Laws*, at <http://www.abanet.org/cpr/mjp-wreynolds.html> (2000).

100. Reynolds & Richman, *supra* note 99.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*; see also Goebel, *supra* note 98.

105. Reynolds & Richman, *supra* note 99.

106. Goebel, *supra* note 98, at 307-08. For a comprehensive review of EU law as compared to that of the United States, see *id.*

107. Babb, *supra* note 74, at 554.

108. Davis, *supra* note 9.

109. *Id.*

110. Babb, *supra* note 74, at 554 (citing Marvin Comisky & Phillip C. Patterson, *The Case for a Federally Created National Bar by Rule or by Legislation*, 55 TEMP. L.Q. 945 (1982)).

law defining permissible multijurisdictional practice and providing consistency among the states.¹¹¹

While the validity of these suggestions is not questioned, the political reality in the United States presents problems that did not exist in the EU. True uniformity as described above would require taking almost all control away from the states, thereby revoking a precedent that has existed since the beginning of our nation's history. Under the national regulatory theory, regulating lawyer activity would become the sole province of the federal government. National rules also inevitably would conflict with state rules of professional conduct relating to rules regulating other aspects of professional conduct. Thus, not only would the national bar be creating national rules with regard to multijurisdictional practice, but it would also likely be forced to create national rules of ethics governing all areas of lawyer regulation. The states would no longer have control over what goes on within their boundaries involving their law.

In addition to infringing upon state autonomy, a uniform standard could jeopardize lawyers' independence by subjecting them to increased political pressures and control from a national bureaucracy.¹¹² Moreover, the actions required to revoke the states' longstanding constitutional right are so involved and complicated that it is extremely unlikely that states and a newly created national bar could come to any kind of consensus.¹¹³ State representatives and regulators would have to be able to provide input.¹¹⁴ There would be no consensus as to who should create the national bar and who should run it. Such an extreme step is probably neither an appropriate nor a feasible step to take.¹¹⁵

Additionally, a national system could too greatly increase the ease of crossing state borders. A "race to the bottom" effect could occur in which lawyers would choose to take a bar exam with the least stringent requirements, leaving open the ability to practice in another state.¹¹⁶ Alternatively, lawyers who are unable to pass one state's examination would simply take the examination of another jurisdiction.¹¹⁷ Upon successful completion, that lawyer could easily practice in the first state, thus undermining the state's right to regulate in the first place.¹¹⁸ Because of the problems inherent in nationalizing our existing system of UPL, the most feasible alternative will likely

111. Green, *supra* note 1.

112. Babb, *supra* note 74, at 554-55.

113. ABA Section of Litigation, *supra* note 64.

114. *Id.*

115. *Id.*

116. Babb, *supra* note 74, at 554.

117. *Id.*

118. *Id.*

be state-based reform adapted more to the current state of the profession.

B. *State-Based Reform*

The more practical approach to reform is to ensure state autonomy—leave the ultimate regulatory authority to the states.¹¹⁹ States are better equipped to determine appropriate regulation of the legal profession in their provinces and have done so for decades.¹²⁰ Although multijurisdictional practice is becoming prevalent in our society, there is no reason that reform cannot be adequately handled, if not best handled, by the states. The quest for reform cannot, however, stop at this conclusion. Problems with current UPL regulations are rampant, and state-based reform is available in a multitude of forms. Below are the most commonly recommended forms of state-based reform. This discussion is not intended to be a comprehensive list of those remedies available; however, one of the following or a combination of the following will likely best suit the country.

1. *Redefine the Unauthorized Practice of Law and Amend Disciplinary Rules Accordingly*

Perhaps the simplest solution to current UPL problems is to redefine UPL.¹²¹ This solution requires the least effort from the states, while allowing them to maintain the most control over lawyer regulation.¹²² A new definition would differentiate between persons licensed in other states and those with no legal experience.¹²³ A lawyer licensed and in good standing in another jurisdiction would not automatically be disqualified from practicing within the state. The definition of unauthorized practice would allow for changes in the nature of legal services, and lawyers then would be aware of when they could be violating the rules.

Amended rules also would include “safe harbor” provisions.¹²⁴ These provisions would address all areas specific to current multijurisdictional practice, such as separate subsections relating to, among others, in-house counsel, prelitigation activities, or alternative dispute resolution. Some states have recommended a safe harbor type of reform in addition to registration. For example, California’s task force recommended that a safe harbor approach apply when an

119. For a useful starting point to address such reform, see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 (1998).

120. Zacharias, *supra* note 95, at 375.

121. Davis, *supra* note 9.

122. Creamer, *supra* note 2.

123. *Id.*

124. Lundy, *supra* note 3; see also Rocco Cammarere, *Caution: MJP Curves Ahead*, 10 N.J. LAW.: THE WKLY. NEWSPAPER 656 (Apr. 9, 2001).

attorney's involvement is too brief or infrequent to justify completion of a cumbersome registration process.¹²⁵

The second step to this level of reform is to amend the disciplinary rules in accordance with the new definition. Disciplinary rules relating to out-of-state lawyers would not be the same as those relating to laypersons. Further, they would take into account the differences lawyers face in their multijurisdictional practice. Such rules would explicitly provide when a lawyer is subject to professional discipline in any state in which that lawyer practices.

2. *Registration or Green Card Admission*

Alternatively, states could implement a state registration system under which an attorney need only register to practice law within a new jurisdiction.¹²⁶ States could maintain a list of attorneys admitted under such status and regulate them accordingly.¹²⁷ Registering attorneys also would be subject to a character investigation, and attorneys or others from the registering attorney's licensed state would be invited to comment on the applicant. This process would be similar to the current registration process of attorneys who take the local bar exam. Additionally, unlike pro hac vice rules, registered attorneys would not be limited in the amount of services they would be able to provide in that jurisdiction. By registering, however, they would subject themselves to discipline for violation of any local rule of professional conduct in that state.¹²⁸

An alternative and less drastic approach to reach the same solution would allow attorneys to register for temporary admission status within the state.¹²⁹ An attorney would then be effectively "licensed" to practice law within the state on a temporary basis. However, such a limited proposal does not fully take into account the current problems of UPL regulations. While it would be somewhat more flexible in supporting multijurisdictional practice, it would not remedy the problem for long. Lawyers often cannot predict or control the amount of work to be done in a new jurisdiction.

One state committee studying the need for multijurisdictional practice reform has proposed this type of reform. The California Task Force on Multijurisdictional Practice has recommended registration as one approach for determining out-of-state lawyer admission to

125. New Report Proposes Changes in Rules on Out-of-State Lawyers, Cal. Judicial Council News Release, at <http://www.courtinfo.ca.gov/newsreleases/NR49-01.htm> (Aug. 1, 2001) [hereinafter New Report].

126. Babb, *supra* note 74, at 555-56.

127. *Id.*

128. *Id.*

129. Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 702 (1995).

provide legal services in California.¹³⁰ The process, as proposed, would not require an out-of-state attorney to pass the California bar exam. Rather, an attorney in good standing in another jurisdiction would be permitted to practice law in California on an ongoing basis.¹³¹ The task force suggests that this form of UPL reform should apply primarily to in-house counsel residing, but not licensed, in California.¹³²

3. *Relaxed Reciprocity/Admissions Standards*

Currently, the majority of states do not have uniform reciprocity standards.¹³³ Reciprocity between states permits attorneys to be admitted to practice within the state simply by being in good standing in their licensed jurisdiction. This alternative is quite similar to the registration requirement except that the attorney would not be subject to a stringent character investigation, nor would the attorney have to complete a time-consuming registration process. Under this standard, the attorney's admittance is contingent upon a reciprocal arrangement with the state from which the attorney is licensed. If that state would allow the same reciprocity to its attorneys, then the state to be entered will do the same. Fifteen jurisdictions presently operate under this criterion.¹³⁴ Additionally, thirteen jurisdictions allow lawyers to practice within their state without requiring other states to reciprocate.¹³⁵ These attorneys need only meet the conditions developed by the state.

This reciprocal approach just described was the original purpose for implementing the multistate section of the bar exam. By initially passing this section when becoming licensed in their home state, lawyers should be permitted easier access to practice within other states. However, as shown above, while states implemented the multistate section, most states did not fulfill the other end of the bargain.

Finally, the Attorney's Liability Assurance Society has developed a proposal known as "green card" admission.¹³⁶ Under this concept, lawyers who have remained in good standing in their home state would receive a card permitting them to practice in another state. The lawyer

130. New Report, *supra* note 125.

131. *Id.*

132. *Id.*

133. See, e.g., Basic Reciprocity by Jurisdiction, at <http://www.crossingthebar.com/Reciprocity-Chart.htm> (last edited Feb. 1, 2002).

134. *Id.*

135. *Id.*

136. Cammarere, *supra* note 124.

would also be required to present a certificate of good standing, file a statement by two sponsors, and pay an annual fee.¹³⁷

4. *CLE Credit/Seminars*

This approach would not require an entering attorney to take the state bar examination. Rather, the attorney would be required to take an established number of seminars, similar to CLE seminars, on local law relating to their practice area to qualify for admittance within the jurisdiction. To ensure adequate completion of these seminars, the attorney could be required to take some sort of quiz at the end. Upon successful completion of these seminars, the attorney would be permitted to practice *in the particular area of law* for which he registered.

5. *Change in Pro Hac Vice Rules*

Currently, pro hac vice rules apply only to counsel who must appear in a court of foreign jurisdiction. These rules could be expanded to apply to other prelitigation activity and ADR activity.¹³⁸ However, this alternative is probably not the most appropriate as the restrictions imposed by pro hac vice admittance may be too time-consuming and unnecessary with regard to these activities.¹³⁹ Safe harbor provisions may better resolve such activities.¹⁴⁰

6. *Assistance From Local Counsel*

Another arrangement to justify more flexibility to admit attorneys into a foreign jurisdiction is to require that the attorney obtain assistance from local counsel.¹⁴¹ This would ensure that the foreign counsel has a knowledgeable and “competent” attorney to assist the lawyer with regard to local rules. Because local rules as complex as confidentiality or disclosure requirements vary substantially among jurisdictions, a local attorney could ensure a foreign attorney’s compliance. Of course, as stated previously, firms could simply use local counsel as a “front man,” thereby requiring his client to pay for counsel yet never consulting with him.¹⁴² Additionally, if such a rule were implemented, states would have to determine the point at which foreign counsel is sufficiently competent to handle cases within the ju-

137. *Id.*

138. ABA Section of Litigation, *supra* note 64.

139. *Id.*

140. *Id.*

141. For example, some states (albeit inconsistently) require attorneys to obtain assistance from local counsel for pro hac vice admission into the state. Jarvis, *supra* note 60. For criticism of such requirements, see *id.*

142. Wolfram, *supra* note 129, at 677.

risdiction on his own. Once the attorney has handled enough cases, he or she will be sufficiently aware of local rules, rendering the justification for local counsel obsolete.

7. *Waiving Into the Bar*

Allowing an attorney to “waive” into the state bar is similar to a reciprocity arrangement without the requirement to reciprocate. Currently, Virginia permits an attorney to waive into its bar upon completion of various administrative tasks and a showing that they have practiced law in another jurisdiction for the past five years and are in good standing.¹⁴³

V. A PROPOSAL FOR CHANGE

The primary purpose of this Article is to address the necessity of reforming current UPL regulations and to discuss possible solutions. From my research of this topic, however, I will generally discuss my suggestions of concepts that must be specifically addressed in a new rule. Of course, while each state will likely propose many different variations of reform in the coming years, this Article addresses the importance of certain factors that must be considered. For persons interested in drafting a concrete rule, official organizations studying this subject have proposed such formally worded rules. On the same note, other organizations have provided useful critiques of these proposals.¹⁴⁴

First, I do not believe in the need for the creation of a national bar or for a uniform rule relating to UPL. Such reform would detrimentally impact a state’s individual authority to regulate itself. A state must maintain the ability to recognize the particularities of its legal profession—most of which differ substantially from one state to another. This being said, in the process of implementing reform, states should recognize that their rules must be able to coexist with similar rules of other states; otherwise the entire purpose of multijurisdictional reform would be defeated. The rule should also provide which state’s disciplinary rules will apply to the entering lawyer.

A reformed rule must adequately define what the state believes to constitute the practice of law and what is unauthorized. In so doing, different rules should be implemented with regard to the type of person affected—a lawyer not licensed in the state or a layperson. One broad rule cannot apply equally to two drastically different scenarios. Regarding unlicensed lawyers, the state should carefully balance the

143. Am. Corp. Counsel Ass’n, *supra* note 69.

144. Copies of these proposals or links to various websites have been compiled at <http://www.crossingthebar.com>. These proposals and critiques would be extremely useful to states in addressing reform in their jurisdictions.

needs of our current society with the ultimate goal of permitting only competent lawyers to practice law. Of course, such a goal entails a careful scrutiny of what constitutes a “competent” lawyer. This definition differs substantially depending upon the source of the inquiry—some could even argue that a state license still does not necessarily make all lawyers competent.

A reformed rule must also take into account the various types of lawyers affected. A separate subsection should be devoted to each distinct category of practice so that all avenues of legal activity are considered. States should recognize the important distinctions among different categories of lawyers and permit or restrict activity specific to each category. Only under this method will an attorney truly be aware of when he or she is violating a rule of professional conduct by entering another jurisdiction, be it directly or indirectly.

Safe harbor provisions should also be included. Such provisions can provide restrictions or protections to activity that is difficult to include in a subsection outlining the rule’s application to different types of legal activity. Safe harbors would provide the final clarity needed to adequately inform attorneys as to permitted conduct and restrictions to ensure that the rules are not subject to abuse.

Reformed rules should take into account the interests of the state, lawyer, and client. Lawyers should be required to inform current or potential clients that they are not formally licensed in a particular jurisdiction. Clients should be aware that their lawyer could ultimately bill more hours in order to become competent in the law of another jurisdiction. Lawyers should also notify their clients of the different admission laws of the jurisdiction to be entered. Overall, the client must make an informed decision as to whether he or she will be adequately benefited by the choice to retain an attorney not licensed in the pertinent jurisdiction.

Current UPL regulations are not only unclear as to what conduct is prohibited—they are outdated. Ultimately, states may conclude that more than one UPL regulation is necessary to address the current situation. This area must be reformed, but such reform must make clear that, although the new rules may more flexibly permit unlicensed lawyers to practice within a foreign state, a lawyer is not entitled to simply enter another state as he or she desires and open a practice. Rather, lawyers should be permitted to develop their practices as their practices require in today’s society without circumventing the valid reasons for regulation. Reformed rules should not only recognize that lawyers needs are changing, but they should also be drafted in a way where they cannot be abused. Finally, the rule must be detailed and unambiguous. Whatever method the states

choose, they must include enough guidance so that lawyers know their boundaries and precisely how they may proceed.

VI. THE NEXT STEPS

While this Article focuses on the need for reform of UPL regulations, the next step is for states to establish more uniform disciplinary rules. For the legal profession to in fact succeed in its quest to adhere to our changing society, rules of professional conduct governing the legal profession must not be so diverse as to indirectly impede a lawyer from effectively practicing in another jurisdiction, as his practice requires and as that state's multijurisdictional rule permits. States should have the ultimate authority to regulate the profession as is needed within a particular state; nonetheless, states should somehow implement a method to inform entering attorneys of the rules governing that state—to comply with the boundaries of that state's multijurisdictional rule.

Additionally, international law is increasing at much the same pace as multijurisdictional practice. While this Article focuses on the needed reform within the United States, firms are also expanding their practices internationally. International reform will require cooperation with various countries, and developments are already underway.¹⁴⁵ For large firms representing corporate clients, they now have no choice. They must adapt to the companies' desire to "go global." Other firms will inevitably follow suit. Even small clients have activities that cross state lines. These clients should not be required to obtain separate legal assistance for each matter in separate states. If the ultimate purpose is to protect the consumer, then the consumer should be able to make the choice. The United States is one of the most progressive nations in the world. The legal profession should adapt to changes that society necessitates, effectively balancing the need for regulation of the profession with the rights or needs of lawyers to as well "go global."

145. See, e.g., Edward J. Cleary, *Crossing State Lines: Multijurisdictional Practice*, 57 BENCH & BAR OF MINN. 29 (2000) (discussing how NAFTA and GATT "have made it easier for 'lawyers from one signatory state to open offices and practice their own national law within the other member states'"); see also Davis, *supra* note 9.